Supreme Court, U.S.
FILED
NOV 23 1994
OFFICE OF THE CLERK

No. 94-724

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STEELWORKERS OF AMERICA,
Petitioner (defendant below),

v.

LESLIE RAY COX, *et al.*,
Respondents (plaintiffs below).

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit was correct in affirming the district court's denial of a summary judgment sought by defendant Union on the grounds that a jury could reasonably find the Union liable under 18 U.S.C. § 1962(c) for conducting its own affairs through a pattern of racketeering activity when the Union knew that two of its most important officials had demanded and had received illegal periodic payments from an employer during collective bargaining negotiations, had ratified the illegal acts, had rendered material assistance in covering up the bribes by filing a false affidavit concealing the facts, had maintained the Union officials in office and had maintained that the Union and USX officials involved in the bribery had done nothing illegal?

2. Whether the Eleventh Circuit was correct in affirming the district court's denial of a summary judgment sought by defendant Union on the grounds that a jury could reasonably find that the Union's actions in connection with concealment of bribes paid over a seven-year period by a pension fund administered by USX to six powerful Union officials (who were in a position to help USX by betraying rank-and-file Union members in collective bargaining negotiations, grievance proceedings, arbitration proceedings, and the conduct of their duties as Union officials) constituted a "pattern of racketeering activity" under RICO?

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OPINIONS BELOW

In addition to the opinions identified by the Union in its petition, the opinion for the Eleventh Circuit affirming criminal convictions in a related proceeding, *United States v. Phillips,* is reported at 19 F.3d 1565 (11th Cir. 1994). Petitions for certiorari in the criminal case are pending before this Court.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 186: Appendix A, (p. 1a).

18 U.S.C. § 1961(1): Appendix A, (p. 2a).

18 U.S.C. § 1962(a): Appendix A, (p. 4a).

18 U.S.C. § 1962(b): Appendix A, (p. 5a).

18 U.S.C. § 1962(c): Appendix A, (p. 5a).

18 U.S.C. § 1962(d): Appendix A, (p. 5a).

STATEMENT OF THE CASE

A. Statement Of Facts.

In March 1983, defendant USX Corporation ("USX" or ("Company") and defendant United Steelworkers of America ("Union") negotiated a new four-year national collective bargaining agreement known as the 1983 Basic Labor Agreement ("BLA") that contained many concessions by the Union.[1] The 1983 BLA covered all rank-and-file steelworkers at all USX facilities in the United States and Canada.

In September 1983, USX and the Union commenced negotiations with respect to a local agreement (which became known as the Fairfield Works Agreement) which modified the BLA and affected some 5,000 employees in Jefferson County, Alabama. Thermon Phillips and E. B. Rich, officers and full-time employees of the Union, represented the steelworkers in these negotiations. Phillips was a director of the Union, elected by the Union's District 36 (a distinct subdivision of the Union including Alabama, Mississippi, Louisiana, Florida, Puerto Rico and the Virgin Islands). Phillips was also Secretary of the Union's Negotiating Committee for the 1983 and 1987 Basic Labor Agreements, and Union Chairman of the Basic Steel Industry Audit and Review Board. E. B. Rich was sub-director of District 36 and was on the Union's Negotiating Committee for the 1987 BLA.

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[1] The Basic Labor Agreement was renegotiated in 1987 and 1991.

At the commencement of the Fairfield Works local negotiations and in violation of 29 U.S.C. § 186, E. B. Rich gave William Miller, the Company's principal negotiator, a list of nine Union officials and told Miller that there would be no local agreement unless the Company agreed to pay the specified Union officials pensions from the United States Steel & Carnegie Pension Fund ("Fund"). The nine Union officials were not qualified to receive Company pensions. The Union negotiators' pension demand remained "on the table" throughout the Fairfield negotiations. On December 24, 1983, when USX incorporated the Union's concessions in a typewritten proposed agreement, Mr. Rich and Mr. Phillips refused to sign the agreement unless USX gave them a favorable reply regarding the officials' pension demand. USX gave a favorable reply as to six of the nine specified Union officials, and the two Union negotiators signed the local Fairfield Works Agreement.[2] In 1984, the Fairfield Six were awarded the pensions which the Fairfield negotiators had demanded.[3] Union App. 4a-5a.

Meanwhile, in November 1983, one month after USX and the Union commenced concessionary negotiations concerning the Company's Gary Works, located in the Union's District 31, USX granted Jack Parton, then Director of the Union's District 31, a leave of absence which provided Parton with pension credit to which Parton was not entitled. Union App. 63a.

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[2] The 1983 Fairfield Works Agreement was used by USX to obtain concessionary local agreements at other facilities. The Agreement abolished 500 rank-and-file job positions, permitted the Company to "contract out" work to non-Union firms, abolished certain craft jobs, cancelled pending grievance and arbitration proceedings, and in other ways took away rights that plaintiffs had under the 1983 BLA. The Company has saved, by its own estimate, a net of more than $23.5 million each year since 1983 in labor costs. That money would have been paid to plaintiffs had they been recalled and compensated pursuant to the 1983 BLA and subsequent BLAs.

[3] The value of the six pensions USX granted was approximately $500,000.

Prior to 1983, when USX granted a leave of absence in excess of the two-year maximum provided for by the BLA to Jack Parton and when USX committed that it would grant retroactive pension credit and USX pensions to the Fairfield Six, USX had in effect a leave of absence policy which was memorialized in the BLAs and which permitted leaves of absence of USX employees to work full-time for the Union for no more than two years. The Union had been trying for years to get the Company to change its leave of absence policy so as to allow all former USX employees who were now employed as officers in the Union to continue to accrue USX pension service credit. The President of the Union, Lynn Williams, testified in his deposition in this action that any Union official who could "get wedges out there" and "push the leave of absence question past the Company" has done a "good thing." Union App. 37a.

On October 22, 1984, the Corporate Policy Committee ("CPC") of USX (which included the highest officials of USX) secretly adopted a resolution which changed the Company's *internal* leave of absence policy to allow the Company's Executive Vice President of Labor Relations, J. Bruce Johnston, *discretion* to grant *retroactive* leaves of absence and USX pensions to certain full-time Union officials.[4]

The resolution presented to the CPC stated that the new October 22, 1984 policy was intended to benefit USX:

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[4] In 1984, while the Fairfield Works Agreement was being implemented and the details of the pensions for the Fairfield Six were being worked out by USX, Rich mentioned the pension promise several times during meetings with USX officials; Jack Golden, Director of the Union's District 37 , delivered to William Miller, USX's principal negotiator, a written "agreement" drafted by Rich; Bruce Johnston wrote Miller, expressing concern as to whether the Company was in jeopardy of losing its "momentum" with Rich and Phillips (App. pp. 13a, 15a); and Miller responded that "the thing [Rich and Phillips] have their eye on, and *the thing that will affect this relationship*, is how we respond to the pensions request which Jack Golden brought to us last week . . ." App. p. 16a [Emphasis added.]

> It is felt that there is a distinct advantage to be dealing with International representatives who were formerly employed by United States Steel concerning potential problems and/or grievances and implementation of the various collective bargaining agreements. Thus, *it is the Company's interest to foster and promote the goodwill of former employees who were granted leaves of absence to work for the USW.* App. p. 6a. [Emphasis added.]

USX contacted Rich, Phillips and the four other District 36 officials and secretly arranged to have the Fund begin mailing monthly pension checks, and provide health and life insurance benefits. Monthly payments were made directly to the Fairfield Six until May 1988, when USX caused the Fund, which USX administered, to begin making the monthly payments into six separate escrow accounts maintained by Mellon Bank for the benefit of the six Union officials and cancelled the health and life insurance benefits. App. p. 21a.

Five months later, on March 5, 1985, Bruce Johnston wrote a letter to Lynn Williams, stating that the Company had amended its leave of absence policy and had granted early retirements to six unnamed Union officials. App. p. 11a. Johnston did not enclose a copy of USX's amended leave of absence policy. Williams testified that he did not request any further information from USX, and testified that he did nothing but refer the March 5, 1985 letter to the Union's general counsel, Bernie Kleiman. Williams testified in the criminal trial that the Union takes the position that it will not get involved when its officials seek unlimited pension credit from the Company during collective bargaining negotiations.

In January 1986, Bruce Thrasher, the Director of the Union's District 35, suspected that Rich and Phillips were receiving Company pensions. That month, Thrasher spoke with Rich about his suspicion and reminded Rich that Rich had told Thrasher in July 1983 that there would be no local agreement

without pensions being granted to Union officials, including Thrasher. Rich told Thrasher that Rich was *not* receiving a USX pension and that the pension matter was still being negotiated with USX.

Still suspicious, Thrasher telephoned Jerome Cooper, the Union's Alabama counsel, and then telephoned Bernard Kleiman, the Union's general counsel in Pittsburgh. Thrasher testified that he told Kleiman what Rich had said to him in July 1983. Thrasher testified that Kleiman expressed shock at the allegations, denied any knowledge of the pensions and promised to investigate. Over the next six months, Thrasher kept in touch with Kleiman but Kleiman told Thrasher that, after a preliminary investigation he had nothing to report, that "USX had refused to talk about the matter," that Lynn Williams had categorically denied any knowledge of what Thrasher had alleged, and that Kleiman could not provide an answer to Thrasher's concerns.

On October 16, 1986, Thrasher filed suit against the Company and the Union in the Northern District of Alabama alleging that Rich and Phillips had been awarded pensions during collective bargaining negotiations in Fairfield in 1983 and that Thrasher was entitled to a pension as well. Union App. 23a, 41a. The *Thrasher* Complaint also alleged that Rich had told Thrasher in July 1983 that there would be no agreement at Fairfield if the pension demands were not granted. The day after a copy of the *Thrasher* Complaint was served on Thermon Phillips, Phillips met with Carl Frankel, the Union's deputy general counsel, and told Frankel that he *was* receiving a Company pension. Despite this disclosure, in its Answer, filed in the *Thrasher* suit on December 1, 1986, the Union *denied* that Rich and Phillips were receiving USX pensions as a result of the Fairfield negotiations. Union App. 23a, 41a. On April 22, 1987, just before the *Thrasher* defendants were due to respond to Thrasher's discovery requests, the suit was settled pursuant to an agreement under which USX agreed to pay Thrasher $88,574 (the present value of

a USX pension), Thrasher agreed to dismiss with prejudice his claims against USX *and* against the Union, and Thrasher agreed to keep the settlement confidential.

In 1988, another Union official, William Sommerville, filed suit against USX and the Union for damages for refusal to grant him a pension, alleging that Rich and Phillips had received pensions as part of the 1983 Fairfield negotiations. Union App. 23a, 41a. The Union filed a motion for a protective order to bar Sommerville from taking the depositions of Rich and Phillips. The Union also filed a motion to dismiss, asserting that the pension Sommerville was seeking would violate 29 U.S.C. § 186. In support of its motion to dismiss, the Union filed an affidavit of its general counsel, Bernie Kleiman. In that affidavit, Kleiman stated that, as of January 30, 1986, Rich and Phillips had *not retired from USX*. The Court of Appeals noted that "Kleiman swore in an affidavit that Rich, Phillips and two others of the Fairfield Six had not retired from USX as of January 30, 1986, although USX records clearly indicate that, for pensions purposes, they had retired." Union App. 23a.

When word leaked out among other Union officials that Rich and Phillips might be receiving Company pensions, Andrew Toth and many other officials wrote the Company requesting USX pension credit, and pensions, for the years during which they had been employed full-time by the Union. Union App. 6a. USX tried to "stall" its response to the Union officials until USX could rescind its unlimited leave of absence policy.

On April 28, 1987, the same day the *Thrasher* suit was dismissed, J. Bruce Johnston wrote Lynn Williams advising that USX's amended leave of absence policy violates the law and had been rescinded, *but that the six unnamed union officials who had been awarded USX pensions pursuant to the amended policy would continue to receive them.* App. p. 17a. Williams responded by letter stating that USX was responsible for its own "unilateral actions." App. p. 19a. At about the same time, USX

denied the requests for USX pensions submitted by Andrew Toth and other Union officials.[5] there is no evidence that the Union *ever* asked the Company for information regarding the Company's 1984 amended leave of absence policy or told *any* Union officials that USX's leave of absence policy had been changed.

Despite 29 U.S.C. § 186 and the Union's own Code of Ethics, both of which clearly prohibit what Rich and Phillips had done, there is no evidence that the Union ever made *any* inquiry other than Kleiman's oblique claims to Thrasher that he had investigated but had found nothing to report. The Union has produced no evidence that it conducted any investigation, or that it had reprimanded or disciplined Rich or Phillips prior to their conviction. In fact, Rich and Phillips were kept in office until October 1990 and then were permitted to retire early on Union pensions.

B. Proceedings Below.

Plaintiffs filed this action in 1988. The district court certified this action as a class action on behalf of employees of USX in Jefferson County, Alabama represented by the Union "in collective bargaining negotiations, grievance proceedings, or arbitration proceedings," from 1983 to the present. Plaintiffs assert that defendants conspired to violate the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. § 1961 et seq.) by a pattern of racketeering activity including mail fraud, violations of 29 U.S.C. § 186 and obstruction of justice (by the Union, for its filing the false affidavit of its general counsel in violation of 18 U.S.C. § 1503). Plaintiffs assert that the Fairfield Works Agreement should be declared void, that plaintiffs' rights under the 1983 BLA and subsequent national Basic Labor Agreements have been breached by the Company, that the Union failed to

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[5] These officials filed suit against USX and the Union. See *Toth v. USX Corp.*, 693 F.Supp. 693 (N.D. Ill. 1988), *aff'd*, 883 F.2d 1297 (7th Cir. 1989), *cert. denied*, 493 U.S. 994 (1989).

give plaintiffs fair representation because the Union representatives demanded and accepted bribes from the employer, USX, and were paid those bribes on a continuing basis while the Union officials "represented" plaintiffs from September 1983 to October 1990 in collective bargaining and in grievance proceedings and arbitration proceedings, and that plaintiffs are entitled to relief under § 301(a) of the Labor Management Relations Act (LMRA) (29 U.S.C. § 185(a)).

After plaintiffs began discovery, a federal grand jury returned indictments against USX, J. Bruce Johnston (USX's Executive Vice President), and E. B. Rich and Thermon Phillips. A jury convicted USX of conspiracy to influence Union officials, violations of 29 U.S.C. § 186, mail fraud and violations of ERISA. Rich and Phillips were convicted of conspiracy and violations of 29 U.S.C. § 186. The convictions of USX, Rich and Phillips were affirmed by the Court of Appeals. *U.S. v. Phillips*, 19 F.3d 1565 (11th Cir. 1994).[6]

Prior to completion of discovery in this civil action, the Company and the Union filed motions for summary judgment. The district court determined that the Company and Union could be liable under RICO for engaging in a pattern of 29 U.S.C. § 186 violations. The district court held that the Union could be liable under 18 U.S.C. § 1962(d) for conspiring with USX, Rich and Phillips to violate § 1962(a), § 1962(b) and § 1962(c), and under 18 U.S.C. § 1962(c) for conducting the affairs of Fairfield Works, the Fund, District 36 and its own affairs (all RICO enterprises) through that pattern of illegal acts. Union App. 15a, 93a-108a. The district court, however, entered summary judgment against plaintiffs on the ground that a jury could not reasonably find that the bribes had influenced the Union negotiators or that the plaintiff rank-and-file employees had been damaged by the defendants' actions.

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[6] J. Bruce Johnston has not yet been tried. Petitions for writ of certiorari by the criminal defendants are now pending before this Court.

The Court of Appeals reversed, holding that a reasonable jury could conclude that the 1983 Fairfield Works Agreement was tainted by bribery, that the Agreement was voidable, and that the jury could properly find that plaintiff employees had sustained damages. The Court of Appeals rejected defendants' alternative grounds for affirmance and found, without considering whether mail fraud and obstruction of justice should be included in the "pattern" equation, (1) that a reasonable jury could find a "pattern" of violations of 29 U.S.C. § 186 (Union App. 12a-14a) and (2) that the Union could be liable for violations of 18 U.S.C. §§ 1962(c) and 1962(d) (Union App. 26a-43a).

REASONS FOR DENYING THE WRIT

This Court should deny certiorari regarding the so-called "non-identity" rule for the following reasons: (1) the rationale for the "non-identity" rule has no application under the facts of this case, and (2) it is unnecessary to reach the issue because the courts below have determined that a jury could reasonably find the Union liable for violation several RICO prohibitions.

This Court should deny certiorari regarding the "pattern of racketeering activities" issue for the following reasons: (1) the establishment of a RICO "pattern" is a factual issue to be resolved by a jury, and a jury could reasonably find from the evidence that defendants had engaged in a pattern of racketeering activity, (2) this was not, as insisted upon by the Union, a "single garden variety bribe" but was, like the situation in *H. J. Inc.*, a "scheme consisting of multiple violations, sufficiently interrelated and continuous to constitute a pattern of racketeering activity," and, (3) this Court has already addressed the "pattern" issue in *H. J. Inc.*, and the holding of the Court of Appeals below is consistent with *H. J., Inc.*, so that there is no need for this Court to revisit the RICO "pattern" question.

I.

THE UNION'S PETITION REGARDING THE SO-CALLED "NON-IDENTITY" ISSUE UNDER 18 U.S.C. § 1962(C) SHOULD BE DENIED.

The Union's petition regarding the so-called "non-identity" issue under 18 U.S.C. 1962(c) should be denied for the following reasons:

A. There Is No True Conflict Among The Courts Of Appeal. A Union That Is Not An "Innocent Victim" Or A Legitimate Enterprise Is Not Entitled To The Benefit Of The "Non-Identity" Rule.

Although the Union claims that it is an "innocent victim" and a "legitimate" enterprise, the facts of the case show otherwise. The Court of Appeals and the district court below recognized that a jury could reasonably find the Union liable under RICO for the acts of its president, Lynn Williams, its general counsel, Bernard Kleiman and two of its highest officials, E. B. Rich and Thermon Phillips. The Union approved of and concealed the bribes demanded by Rich and Phillips during the negotiations that led to the concessionary Fairfield Works Agreement. The Union's policy for years has been that the Union's employees are entitled to receive unearned pensions from employers with whom they deal. Lynn Williams has testified that any Union official who has bargained for such a pension has done a "good thing."

The Court of Appeals held that the Union could be liable under RICO based on *respondeat superior* principles, ratification, aiding and abetting, and conspiracy. Union App. 33a-43a. Moreover, there is evidence that (1) Jack Parton, Director of the Union's District 31 demanded and received a similar bribe during concessionary local collective bargaining negotiations in the fall of 1983 with USX in Gary, Indiana (See Union App. 63a), (2) Jack Golden, Director of the Union's District 37 was involved in the mechanics of Rich's and Phillips payoff and (3) Bruce Thrasher, Director of the Union's District 35 obtained the present value of a pension from USX by filing a lawsuit against USX *and the Union* alleging that he was entitled to the same pension that Rich and Phillips had demanded and obtained during the Fairfield negotiations. All of the foregoing facts support the conclusion that the Union is not an "innocent victim"

or an "innocent conduit" whose affairs were conducted through a pattern of racketeering activity.[7]

The "non-identity" rule which has been applied by the other circuit courts of appeal had its genesis in a concern by those courts that a *innocent* and *legitimate* "enterprise" could become liable under § 1962(c) of RICO simply because the "enterprise" had been used by others as a *passive instrumentality* of racketeering activity. For example, the Court of Appeals in *D& S Auto Parts, Inc. v. Schwartz,* 838 F.2d 964 (7th Cir. 1988), *cert. denied,* 486 U.S. 1061 (1988), held that the defendant enterprise, which had, upon discovering an employee's embezzlement, immediately fired the employee and had reported the embezzlement to the proper authorities, should not be held liable under § 1962(c). In this case, however, the facts are vastly different.

Many of the cases cited by the Union recognize that an "enterprise" should not escape liability under RICO when the "enterprise" itself is involved in illegal activity. For instance, the Third Circuit in *Brittingham v. Mobil Corp.,* 943 F.2d 297, 302 (3d Cir. 1991) stated: "It is theoretically possible for a corporation to take a separate 'active' role in RICO violations also committed by its employees. The corporation would not be the passive victim, but the active perpetrator."[8]

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[7] There is no evidence in the record to support a contention that the Union was an "innocent victim" or a "passive instrumentality" of the racketeering at issue.

[8] Other circuits have reached a similar conclusion. See *Busby v. Crown Supply, Inc.,* 896 F.2d 833, 839 n.5 (4th Cir. 1990) (*respondeat superior* applies when enterprise is an 'aggressor'); *Yellow Bus Lines, Inc. v. Driver's Local 639,* 883 F.2d 132, 140 (D.C. Cir. 1989), *cert. denied,* 501 U.S. 1222 (1991) referring to *Hartley,* the court said that "an exception to the non-identity rule has at times been made for the institution that functions as both 'perpetrator' and 'victim' "); *Brady v. Dairy Fresh Products Co.,* 974 F.2d 1149, 1155 (9th Cir. 1992) ("*respondeat superior* and agency liability furthers both the compensatory and deterrent goals of the RICO statute" by

(Footnote 8 continued on next page)

This Court is presented with a union whose officials pursue their own interest instead of those of the rank-and-file workers which the union is supposed to represent. The Union itself has abandoned its statutory duty by encouraging its officials to demand and accept bribes and then has kept its bribe-taking officials in office until their felony convictions *forced* their departure. The notion put forth by the Union that RICO was enacted to protect a union which betrays rank-and-file members is morally offensive. This Union is anything but "innocent." This Union has abandoned the interests of its rank-and-file members and has preferred the interests of its own officials.[9] The real victims in this case are the employees of the Fairfield Works, who were entitled to receive faithful, honest, non-corrupt representation. See *Toth v. USX Corp.*, 693 F. Supp. 693, 699 (N.D. Ill. 1988), *aff'd*, 883 F.2d 1297 (7th Cir. 1989), *cert. denied*, 493 U.S. 994 (1989).

(Footnote 8 continued)

encouraging "employers to monitor more closely the activity of their employees and agents to ensure that these agents are not involved in racketeering activities."); *D&S Auto Parts, Inc. v. Schwartz*, 838 F.2d 964, 967 n.5 (7th Cir. 1988), *cert. denied*, 486 U.S. 1061 (1988) (there may be situations in which illegal conduct takes place "at such a high level that it may be deemed corporate policy to promote or engage in illegal conduct."); *Bennett v. United States Trust Co. of New York*, 770 F.2d 308 315 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986) (the non-identity rule "focuses the section on the culpable party and recognizes that the enterprise itself is often a passive instrumentality of the racketeering activity:); *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1412 (3d Cir. 1993) (stating that purpose of the rule is to prevent the punishment of innocent victims, the court noted that in *Brittingham, supra*, plaintiff "failed to produce evidence indicating that the defendant corporation, in contrast to individuals or entities acting on their behalf, took a distinct role in the alleged racketeering activity.")

[9] The Union's position in this litigation is but one example. Moreover, the Union leadership to this day embraces Rich and Phillips by raising money for them and by including the ex-officials in many Union affairs.

The Eleventh Circuit decision below, following *U.S. v. Hartley,* 678 F.2d 961 (11th Cir. 1982), *cert. denied,* 459 U.S. 1170 (1983), was correct in interpreting § 1962(c) of RICO so as to permit liability to be imposed on a union when the union, as a RICO person, conducts its own affairs through a pattern of racketeering activity. The opinion below is fully in accord with those decisions in other circuits recognizing that a culpable "enterprise" may be liable for damages under § 1962(c).

The Union appears to argue that any union is *ipso facto* a "legitimate" and "innocent" enterprise that could never be held liable under RICO. The Eleventh Circuit recognized below, however, that the Sixth Circuit has held that:

> Such a prohibition, if it existed, would prevent corporate persons from ever being found liable under RICO, since corporate principals may act only through their agents. Such a rule would be manifestly contrary to the intent of Congress, and we decline to adopt it.

Union App. 32a (quoting *Davis v. Mutual Life Ins. Co.,* 6 F.3d 367, 379 (6th Cir. 1993), *cert. denied,* 114 S.Ct. 1298 (1994).)

This Court has recognized, in another context, in *Pacific Mutual Life Ins. Co. v. Haslip,* 499 U.S. 1 (1991), that imposition of liability under *respondeat superior* principles furthers important societal goals:

> Imposing exemplary damages on the corporation when its agent commits intentional fraud creates a strong incentive for vigilance by those in a position "to guard substantially against the evil to be prevented."

Id. at 14 [Citations omitted.]

B. In Any Event, It Is Unnecessary For This Court To Reach The "Non-Identity" Issue In This Case Because The Union May Be Held Liable For Violating Several Provisions Of RICO.

The question of whether the Union can be held liable under 18 U.S.C. § 1962(c) for conducting its own affairs through a pattern of racketeering activity does not need to be decided by this Court because, as the Union concedes in its petition (at p. 13 n.6), the Court of Appeals held that the Union could also be liable under 18 U.S.C. § 1962(c) for conducting the affairs of the Fund and/or the affairs of the Fairfield Works through a pattern of racketeering activity.[10]

The opinion of the Court of Appeals states:

> Even if we adopted the non-identity rule, however, the Union still would not be exempt from liability. Although the plaintiffs have alleged that the Union is a RICO enterprise for purposes of § 1962(c), they also allege that the Fairfield Works and the Fund are enterprises as well. The non-identity rule would not be threatened by holding the Union liable for its agents' corruption of the mill or the Fund. (Union App. 33a).

Plaintiffs asserted below that the Union is liable under 18 U.S.C. § 1962(c) for conducting the affairs of its District 36 through a pattern of racketeering activity.[11] (Union App. 93a).

---

[10] There is no evidence in the record to support the Union's claim that Fairfield Works cannot be a RICO enterprise. Fairfield Works is an enterprise that has its own budget and management and for many years was separately incorporated as the Tennessee Coal, Iron and Railroad Company. There is also no merit to the Union's claim that the corruption of the Fund, the source of the bribe money, could not have injured plaintiffs.

[11] District 36 is a discrete political and geographical division of the Union which covers Alabama, Mississippi, Louisiana, Florida, Puerto Rico and the Virgin Islands and which has its own director and officers.

The Court of Appeals below affirmed the district court's conclusion that the Union could also be liable under 18 U.S.C. § 1962(d) (Union App. 43a) for conspiring with USX, Rich and Phillips to violate 18 U.S.C. § 1962(a), § 1962(b) and § 1962(c). Union App. 93a.

The issue raised by the Union would become important only if a jury found the Union liable *only* under 18 U.S.C. § 1962(c) and then *only* for conducting its *own affairs* through a pattern of racketeering activity. Contrary to the Union's assertion in footnote nine of the petition, and as discussed in Section A above, the cases relied on by the Union do not foreclose imposition of RICO liability on a Union that approves of and acquiesces in the bribe-taking of its officials and takes affirmative measures to conceal demands for bribes and receipt of bribes when they occur. Given the facts of this case as well as the posture of plaintiffs' RICO claims, it seems unlikely that the jury would so limit its verdict.

Plaintiffs respectfully submit that this Court should not grant the Union's petition for certiorari at this time because the Union is not an innocent, legitimate "enterprise" and because this Court need not reach and decide the issue presented, which is highly unlikely to have any effect on the Union's ultimate liability under RICO.

II.

THE ELEVENTH CIRCUIT WAS CORRECT IN AFFIRMING THE DISTRICT COURT'S DENIAL OF SUMMARY JUDGMENT ON THE "PATTERN" ISSUE RAISED BY THE UNION'S PETITION, BECAUSE A JURY COULD REASONABLY FIND THAT PAYMENTS BY USX TO SIX UNION OFFICIALS WHICH CONTINUED FOR A PERIOD LONGER THAN FOUR YEARS AND WHICH WERE CONNECTED BY A COMMON SCHEME, PLAN OR MOTIVE WERE SUFFICIENT FOR A JURY TO FIND "CONTINUITY" AND "RELATEDNESS" AND A "PATTERN OF RICO ACTS

The Union argues in its Petition that plaintiffs have not established a pattern of racketeering activities. The Union argues that the monthly bribes paid to each of the six Union officials were simply a part of a single act of bribery with multiple installment payments. The same arguments were made below by USX and the Union, and were rejected by the district court and the Court of Appeals.

In addressing this argument the Court of Appeals correctly applied this Court's teaching in *Sedima, S.P.R.L. v. Imrex Co.*, 472 U.S. 479 (1985) and *H. J., Inc. v. Northwestern Bell Telephone Company*, 492 U.S. 229 (1989) to find that "a single episode of bribery could be viewed by a jury as a scheme consisting of multiple violations, sufficiently interrelated and continuous to constitute a pattern of racketeering activity" Union App. P. 13a. The Court of Appeals pointed out that "[e]ach monthly payment of pension benefits to the Fairfield Six could be interpreted as a 'thing of value' for purposes of 29 U.S.C. § 186, and therefore could be interpreted as a separate predicate act for purposes of RICO." *Id.* The Court of Appeals also held that the "Parton matter is plainly relevant to plaintiffs' efforts to establish a pattern of RICO violations." Union App. 63a.

The payments of bribes to the Union officials were made pursuant to an amendment by USX's Corporate Policy Committee of the Company's leave of absence policy. The amended leave of absence policy was used by USX to pay monthly pensions to those Unions officials whom Johnston (USX's Executive Vice President - Labor Relations) approved in his discretion. Direct monthly payments to the Fairfield Six were made for a period of more than four years and have thereafter continued to date to be made into escrow, for the benefit of the Fairfield Six. In addition, USX granted each of the Fairfield Six health and life insurance benefits, which USX cancelled in June 1988. USX would still be making payments directly to the Union officials, had not the fact of the payments, notwithstanding efforts of both USX and the Union to cover up the payments, come to light. In separate letters to each of the Union officials dated May 26, 1988, J.D. Short, USX's Vice President - Administration, advised each of the Fairfield Six that the pensions, due to their questionable legality, would thereafter be paid into "an interest-bearing escrow account." (App. p. 21a.) In a letter from USX Executive Vice President, J. Bruce Johnston, to Union President Lynn Williams, dated April 28, 1987, Johnston advised that although the amendment to the leave of absence policy had been rescinded, USX was "not rescinding the leaves of absence which previously had been granted pursuant to such policy." (App. p. 18a.)

Thus, the racketeering predicates alleged by the plaintiffs meet the "continuity plus relationship" pattern of *H. J., Inc.*. since the racketeering predicates are "related *and* . . . they amount to and pose a threat of continued criminal activity." *H.J., Inc.*, 492 U.S. at 236. This Court recognized in *H.J., Inc.*, quoting its holding in *Sedima*, that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 492 U.S. at 240.

In addition to the obvious fact that the Fairfield Six were on the Company's "payroll" for a long period of time (and would have remained so to this day if the defendants had not been caught), the fact that illegal pension credit was also given to Jack Parton, a Director of another Union District, and the fact that the Union knew of the bribes and attempted to conceal the scheme in many ways, including the obstruction of justice, the threat of continuity is established by the fact that payment of illegal bribes was a part of USX's and the Union's regular way of doing business.

As this Court made clear in *H.J., Inc.* "... threat of continuity is sufficiently established where the predicate can be attributed to a defendant operating as a part of a long-term association that exists for criminal purposes . . . The continuity requirement is likewise satisfied where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO 'enterprise'." *Id.* at 242.

Without question, the criminal conduct of USX and the Union at Fairfield Works and Gary Works embraces criminal acts (violations of 29 U.S.C. § 186, the mail fraud statute and 18 U.S.C. § 1503), and the criminal acts have the same or similar "purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." Here the overall purpose was not only to bribe Union officials into agreeing to concessions in the December 24, 1983 Fairfield Works Agreement, but *also* to obtain the services of the six Fairfield Union officials in implementing the Fairfield Works Agreement, collective bargaining, grievance proceedings and arbitration proceedings. The new leave of absence policy was crafted by a committee made up of the Chairman of the Board and Chief Executive Officer of USX, the President of USX and other senior Company officials. The illegal bribes continued to be made to the Union officials for over

four years and have continued thereafter to be paid into six interest-bearing escrow accounts.

The Union argues that the payments to six Union officials was merely a single bribe. In its Petition (at p. 9), the Union blithely characterizes the scheme as "a garden variety bribe transaction." Plaintiffs fail to appreciate the Union's apparent efforts to minimize the significance of the bribes paid to the Union's six officials. What is involved in this case is a *series* of bribes paid with the approval of USX's senior management and with the approval and assistance of the Union's President, Lynn Williams and general counsel, Bernie Kleiman. Approximately 5,000 persons in the plaintiff class were adversely affected and were deprived of faithful Union representation from *1983* to *1990* (when Rich and Phillips were finally removed from office) and even thereafter, because the Fairfield Works Agreement continues to this day to be enforced.

In *H.J., Inc.* this Court was faced with a somewhat similar fact situation, in which a public utility had been accused of making illegal cash payments to members of a state regulatory commission, and of giving them other items of value over an extended period. The district court dismissed the petitioner's complaint on the ground that the complaint alleged only a "single fraudulent effort or scheme." The Court of Appeals affirmed, and this Court granted certiorari, holding, at the outset that "[m]ost Courts of Appeals have rejected the Eighth Circuit's interpretation of RICO's pattern concept to require an allegation and proof of multiple schemes . . ." 492 U.S. at 235. This Court held, in *H.J., Inc.*, that in adopting RICO, Congress envisioned "a concept of sufficient breadth that it might encompass multiple predicates within a single scheme that were related and amounted to, or threatened the likelihood of continued criminal activity." *Id.* at 237.

The Union would have this Court grant certiorari because the Union asserts a conflict in decisions of the circuits has arisen

after this Court's holding in *H.J., Inc.* The cases relied upon by the Union are all distinguishable on their facts. Moreover, the Union in its petition (p. 16, n.9) and USX in its brief in support of the Union's petition (at p. 3), cite *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22 (1st Cir. 1987) which was decided *before* this Court's decision in *H. J., Inc.* In *Fleet Credit Corporation v. Sion,* 893 F.2d 441 (1st Cir. 1990), the First Circuit stated that *Roeder* was no longer good law, and stated that "[i]n the future, however, courts should directly follow the Supreme Court's formulation in *H.J., Inc.*; the pre-*H.J., Inc.* approach is no longer a reliable guide." *Id.* at 445.

Since this Court has fully addressed the "pattern" issue in *H.J., Inc.*, it is unnecessary for this Court to address the issue again. The Court of Appeals below applied *H.J., Inc.* correctly, holding that defendant's motions for summary judgment *as to this issue* was properly denied by the district court below, because a jury could reasonably find that the Union and the Company engaged in a "pattern" of racketeering acts. There is no reason why this Court should grant certiorari and revisit the RICO "pattern" requirements. The Union's Petition for Certiorari should, therefore, be denied.

CONCLUSION

Plaintiffs respectfully submit that this Court should deny the Union's Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

J. Vernon Patrick, Jr.*
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APPENDIX

APPENDIX A

29 U.S.C. § 186

Restrictions of payments to employee representatives

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act [49 USCS §§ 301-327]) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

18 U.S.C. § 1961.

Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relative [relating] to fraud and related activity in connection with access devices), section 1094 (relating to the transmission

of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), section 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

[See main volume for text of (2) to (9)]

(10) "Attorney General) includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter [18 USCS §§ 1961 et seq.]. Any department or agency so designated may use in investigations authorized by this chapter [18 USCS §§ 1961 et seq.] either the investigative provisions of this chapter [18 USCS §§ 1961 et seq.] or the investigative power of such department or agency otherwise conferred by law.

(Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 941; Nov. 2, 1978, P. L. 95-575, § 3(c), 92 Stat. 2465; Nov. 6, 1978, P. L. 95-598, Title III, § 314(g), 92 Stat. 2677; Oct. 12, 1984, P. L. 98-473. Title II, Ch IX, § 901(g), Ch X, Part N, § 1020, 98 Stat. 2136, 2143; Oct. 25, 1984, P. L. 98-547, Title II, § 205(1), (2), 98 Stat. 2770; Oct. 27, 1986, P. L. 99-570, Title I, Subtitle H, § 1365(b), 100 Stat. 3207-35; Nov. 10, 1986, P. L. 99-646, § 50(a), 100 Stat. 3605; Nov. 18, 1988, P. L. 100-690, Title VII, Subtitle B, §§ 7013, 7020(c), 7032, 7054, Subtitle N, Ch 1, § 7514, 102 Stat. 4395, 4396, 4398, 4402, 4489; Aug. 9, 1989, P. L. 101-73, Title IX, Subtitle F, § 968, 103 Stat. 506.)

18 U.S.C. § 1962.

Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the

meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debts.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 942; Nov. 18, 1988, P. L. 100-690, Title VII, Subtitle B, § 7033, 102 Stat. 4398.)

APPENDIX B

PLAINTIFFS' EXHIBIT #75

FOR CONSIDERATION OF THE CORPORATE POLICY COMMITTEE — October 22, 1984

Company:	United States Steel Corporation
Subject:	Revision of PER 223-51, Leaves of Absence
Scope:	Former Employees of United States Steel Corporation who are current employees of the United Steelworkers of America International Union as defined in the Proposal
Basis for Proposal:	Under the Leave of Absence Policy, bargaining unit employees who accept full time employment with the union are limited to a one-year leave of absence which may be extended for one additional year before service breaks. Consequently, many of these former employees never attain eligibility for a USS pension. Labor Relations is of the opinion that it is in the Company interest that United Steelworkers of America International Union (USW) representatives with whom they deal be familiar with the United States Steel facilities they represent. It is felt that there is a distinct advantage to be dealing with International representatives who were formerly employed by United States Steel concerning potential problems and/or grievances and implementation of the various collective bargaining agreements. Thus, it is in the Company's interest to foster and promote the goodwill of former employees who were granted leaves of absence to work for the USW.

Therefore, it is proposed that the Leave of Absence Policy be revised to permit granting leaves of absence beyond two years with the concurrence of the Corporate Policy Committee.

Proposal: Effective February 29, 1984

(a) Amend paragraph B.2.d of PER 223-51 by replacing the second sentence of such paragraph with the following sentence (underscoring denotes the change):

"Such leaves of absence shall not break continuous service and shall be for not more than one year and may be renewed for a further period of one year at the discretion of the Company, *except as the Corporate Policy Committee approves the granting of a leave of absence for a longer period of time.*"

(b) Grant leaves of absence to former employees who meet the conditions specified below:

A leave of absence shall be granted for the period between the date on which the employee left active employment with United States Steel Corporation and the earlier of (i) the date of retirement from United States Steel Corporation, or (ii) the date employment with the United Steelworkers of America International Union terminates, with the proviso that such leave of absence which is creditable as continuous service shall be used for the

purpose of determining eligibility for any type of pension under the 1980 Non-Contributory Pension Rules and any successor thereto other than a 30 year, 60/15 or deferred vested pension and to determine the amount of pension under said rules, except that the pension provided with respect to such service shall be determined solely on the minimum formula of the rules; and further, that such leave of absence shall be granted only to employees of United States Steel Corporation's current steel producing operations (e.g., Fairless, Mon-Valley, Lorain, Gary, Geneva, Texas and Fairfield) who (a) prior to January 1, 1978 left active employment with United States Steel Corporation in order to accept or continue employment with the International Union, (b) from the time of cessation of active employment until February 29, 1984 shall have continued in the active employment of the International Union and (c) shall continuously have held positions servicing bargaining units at the U. S. Steel division in which he had been employed.

Recommendation: That the foregoing proposals be adopted by the Corporate Policy Committee.

Submitted by /s/ J. Bruce Johnston
J. Bruce Johnston
Executive Vice President
Employee Relations

PLAINTIFFS' EXHIBIT #73

UNITED STATES STEEL CORPORATION
CORPORATE POLICY COMMITTEE
Meeting of October 22, 1984
Pittsburgh, Pennsylvania

A meeting of the Corporate Policy Committee of United States Steel Corporation was held at 600 Grant Street, Pittsburgh, Pennsylvania, on Monday, October 22, 1984, at 9:15 A.M.

There were present:

D. M. Roderick
T. C. Graham
R. M. Hays
H. D. Hoopman
J. B. Johnston
T. Marshall
W. E. Swales
W. B. Thomas

being a quorum.

The Chairman, D. M. Roderick, presided. R. M. Hays was Secretary.

Revision to PER 223-51

On motion, duly made, seconded and unanimously carried, the following resolution was adopted:

RESOLVED: That revision of PER 223-51, Leaves of Absence, in the Administration Manual - Personnel, as set forth in statement submitted to this meeting, be, and the same hereby is, authorized as amended at the meeting.

CPC 10/22/84

Adjournment — On motion, duly made, seconded and unanimously carried, the meeting adjourned.

/s/ R. M. Hays
Secretary

PLAINTIFFS' EXHIBIT #86

United States Steel Corporation
600 Grant Street
Pittsburgh, Pennsylvania 16230

J. Bruce Johnston
Executive Vice President
Employee Relations

March 5, 1985

Mr. Lynn R. Williams, President
United Steelworkers of America
Five Gateway Center
Pittsburgh, PA 15222

Dear Lynn:

From time to time we review and update our records concerning pension administration matters including those relating to Company recognition of bargaining unit employees who accept positions with the International Union. Accordingly, it is timely to restate U.S. Steel's policy for granting Leaves of Absences for such purposes.

As in the past, we will comply fully with the language of Section 13 of the Basic Labor Agreement which defines the availability of Leaves of Absence. In addition to the provisions set forth in Section 13, please be advised that, effective February 29, 1984, United States Steel's procedure was revised so that Leaves of Absence applied for by International Union Representatives may be permitted for longer periods than those established in the Labor Agreement, in designated circumstances, at the discretion of the Company on a case-by-case basis. Pursuant to the above policy, we have approved requests for Leaves for six (6) International Union Representatives, qualifying those individuals for early retirements under the United States Steel Pension Plan.

We continue to recognize the value to both parties in granting requests for Leaves of Absence, on an even-handed basis, to a reasonable number of employees who accept or hold positions with the International Union for responsibilities which directly serve U.S. Steel facilities.

Yours very truly

/s/ J. Bruce Johnston

PLAINTIFFS' EXHIBIT #19A

Mill, union view work schedules differently

(*Birmingham Post-Herald, 7-12-84*)

Roughly one out of five workers at U.S. Steel's Fairfield Works are now working four-day weeks, Robert Armstrong, president of U.S. Steelworkers of America Local 1013, said.

The plant's maintenance workers, pipefitters, millwrights and electricians — shifted to the four-day work week this week, Armstrong said.

The workers have been told they will return to a five-day work week after four to six weeks, according to Armstrong.

The exact number of maintenance workers employed at the plant was not available.

Maintenance workers earn an average hourly wage of $11.80, Armstrong said.

That means biweekly paychecks will contain about $100 less than they previously did.

"This is a big blow to them financially," Armstrong said.

Many maintenance workers still are recuperating from large debts incurred while the plant was closed for 21 months before reopening in February.

"Nobody has had time to get caught up on bills," Armstrong said.

Sloan Hill, as official spokesman for U.S. Steel said there were no "significant changes" in work schedules.

The union president's account of changes at the plant was slightly different from that given by Hill.

Hill, public affairs manager, said the change in work schedules is strictly routine. He said workers normally are scheduled only when they are needed.

"In this crazy business we're in, you're on when the need is there," Hill said.

Most workers change schedules at least weekly, he said.

"Every other department shifts from day to day, or week to week."

The steel plant had to lay off nearly 100 maintenance workers in April, Hill said.

The workers received pink slips after only about two months of employment at the plant.

"A number of maintenance people came in to help get the plant started up again. But when the job was done, it was done," Hill said.

The change in work schedules simply shows that the need for maintenance work has lessened again, he said.

But Armstrong said the need for maintenance work has not changed since April.

He said the company decided to hire outside help rather than continue to employ union members full time.

"We would understand if work was not available for us, but the outside contractors are doing work that our people should be doing," Armstrong said.

Local 1013 filed a grievance about the practice several weeks ago. Following grievance procedures, the next step will be arbitration, Armstrong said.

Armstrong said he was told by the company that workers would have been laid off if the work week had not been shortened.

Meanwhile, it seems that almost 100 maintenance workers who were laid off in April have little hope of returning to their jobs soon, Armstrong said.

The workers were told they would be rehired as soon as possible, he said.

"The only thing the company told me at that time was they didn't feel like it would be a long-term thing.

[*Handwritten note next to article*]

WM

1. what is the real story?

2. are we in jeopardy of losing our momentum with E.B. and Thermon

JBJ

7/14/84

PLAINTIFFS' EXHIBIT #19

United States Steel Corporation

July 23, 1984

Mr. J. Bruce Johnston:

Birmingham Post-Herald Article 7-12-84

In response to your first question on the subject clipping, the real story is that Fairfield is experiencing the same downturn in flat roll operations as the Company's other plants. As a result, it has become necessary to reduce Central Shops maintenance forces. This was done by going to a four-day workweek rather than a layoff. Actually, the affected employees and most of the local union representatives were happy with this choice, since the last thing most Fairfield employees want at this stage is another layoff. A potential issue was about to arise as a result of Operating Management planning to contract our Shops' work while our employees were on a four-day week, but Steve Menzel headed that off with the operators.

With respect to our second question concerning Thermon Phillips and E.B. Rich, nothing in this incident has impacted our relationship with them. The thing they have their eye on, and the thing that will affect this relationship, is how we respond to the pension request which Jack Golden brought to us last week and which I forwarded to you last Friday.

/s/ WM
William Miller

gb
attachment

PLAINTIFFS' EXHIBIT #96

Mr. Lynn R. Williams, President
United Steelworkers of America
Five Gateway Center
Pittsburgh, PA 15222

April 28, 1987

Dear Mr. Williams

As you may recall, on March 5, 1985, I wrote you to advise that the then United States Steel Corporation had amended its leave-of-absence policy in order to permit the award of retroactive leaves of absence to designated union officials who had left its employ prior to January 1, 1978 to accept positions with the International Union. Eligibility for such leaves of absence was limited to employees who had previously worked in USX's then existing steel producing operations and who had continuously serviced the USX division which they had left. Moreover such leaves of absence would permit employees to receive pension credit for certain types of pension only. This amendment had been adopted in response to complaints by International Union officials that USX had been much more restrictive in its grants of leaves of absence to long term Union officials than had the other employers in the steel industry.

Although at the time, we believed that granting of such leaves of absence was fully permissible under law, we have now concluded in view of recent Decisions by the Second Circuit Court of Appeals in *BASF Wyandotte Corporation v. Local 227 International Chemical Worker's Union and AFL-CIO, et. al.*, 791 F.2d 1046 (2d Cir. 1986) and most particularly, by the Third Circuit Court of Appeals in *Trailways Lines v. The Trailways, Inc. Joint Council of the Amalgamated Transit Union, AFL-CIO, CLC*, 785 F.2d 101 (3rd Cir. 1986, cert. den. 1986) that granting such leaves of absence (or accepting such leaves of absence)

violates the prohibitions of Section 302 of the Labor Management Relations Act.

Accordingly, we have rescinded such amendments to our leaves-of-absence policy to assure compliance with the law. Consistent with that change, we are denying several recent requests for such leaves of absence (apparently based on the earlier amendment) from employees of the International Union. We are not rescinding the leaves of absence which previously had been granted pursuant to such policy.

Yours very truly,

/s/ J. Bruce Johnston

J. Bruce Johnston

PLAINTIFFS' EXHIBIT #97

United Steelworkers of America
AFL-CIO-CLC
Five Gateway Center
Pittsburgh, PA 15222

Lynn R. Williams
International President

June 24, 1987

J. Bruce Johnston
Executive Vice President-Employee Relations
USX Corporation
600 Grant Street
Pittsburgh, Pennsylvania 15230

Dear Mr. Johnston:

This is in response to your letter of April 28, 1987 regarding the Company's new leave-of-absence policy.

To place the matter in context, I note that this is the second letter I have received from you announcing a policy change by the Company with respect to the circumstances under which it would or would not grant a leave-of-absence to employees who accept positions with the United Steelworkers of America. The earlier letter is dated March 5, 1985 and informed me of a policy effective February 9, 1984 by which the Company would determine whether to grant leave-of-absences applied for by International Union representatives for longer periods than those established in the Labor Agreement "in designated circumstances, at the discretion of the Company on a case-by-case basis." Your current letter states that you are now rescinding that policy and denying several recent requests for leaves-of-absence based on the former policy. In no case did the Company negotiate on the matter with the Union before amending or rescinding an existing policy relating to the leaves-of-absence subject.

Let me state the Union's position with respect to this matter clearly and concisely. As far as we are concerned, the Company acted unilaterally on both occasions and you bear the full responsibility for your actions. For the Union's part, we intend to pursue and vindicate whatever leave-of-absence rights flow from our collective bargaining and benefit agreements, including applicable practices.

Though little purpose is served by debating such matters at this juncture, I do want to record the Union's disagreement with your current explanation for the change in leave policy which became effective February 29, 1984 and, indeed, with the current description of the contents of that three-year old policy. It seems to me that what is being said by the Company in April of 1987 on these two subjects does not entirely square with what was said in March of 1985. The differences are evident when you compare the two letters.

Finally, my lawyers advise me that the pension accrual issue aside, the Third Circuit case you cited, *Trailways Lines, Inc. v. Trailways, Inc. Joint Council of the Amalgamated Transit Union, AFL-CIO-CLC,* 785 F.2d 101 (3d Cir. 1986, *cert. den.*. 1986), does not stand for the proposition that the Company is legally precluded from granting leaves-of-absence to International employees thereby preserving their Company recall rights. You may wish to re-examine your position on that score.

Sincerely,

/s/ Lynn R. Williams
LYNN R. WILLIAMS
INTERNATIONAL PRESIDENT

PLAINTIFFS' EXHIBIT #108

United States Steel and
Carnegie Pension Fund

(A Pennsylvania Corporation)

600 Grant Street
Pitsburgh, Pennsylvania 15230

J.D. Short
Vice President — Administration

May 26, 1988

Mr. Thermon Phillips
1240 Southwind Drive
Helena, AL 35080

Dear Mr. Phillips:

I write you in connection with your receipt of a USX 70/80 retirement under Mutually Satisfactory Conditions. As you will recall, you are receiving that pension because you were granted a leave of absence, retroactive to the date of your termination with United States Steel Corporation (now USX). This retroactive leave of absence was the result of the adoption by USX of a policy of granting such leaves of absence under carefully defined circumstances. This policy authorized the removal of the break in your pension continuous service, which occurred in 1953. That removal resulted in your being granted pension continuous service credit, retroactively, for the intervening period.

Since that time, three Decisions by the United States Court of Appeal (for the Second, Third and Fifth Circuits, respectively) have raised serious challenges concerning the legality of approving special, retroactive leaves of absence which enable union officials to receive credit for pension purposes for extended periods which they spend in the service of the Union. Recently,

two lawsuits have been filed by former and present Union officials -- one in Alabama by Messrs. Summerville and Elliott and the other in Illinois by Messrs. Sadlowski, Toth, Foley, et al., seeking to require USX Corporation to expand its granting of retroactive pension continuous service credit to cover the named plaintiffs for extended periods of time in which they were in the employ of the Union.

While it was the preference of USX and of the United States Steel and Carnegie Pension Fund, which is also a defendant in these actions, to await ruling from the courts concerning the appropriate action to be taken with respect to these requests for leaves of absence as well as past grants of leaves of absence, we now have been advised by outside counsel that continued payment of pension to you, in light of the current legal developments, could possibly subject both you and the defendants in these actions to criminal liability. In view of the above, we have determined that the only prudent course of action for us to take is to suspend your pension immediately, and to pay such pension into an interest bearing escrow account pending a final, definitive judicial resolution of the litigation in question and, if necessary, appropriate court rulings with respect to the leave of absence granted you (of course, while your pension is in suspension, you will not be covered by USX's retiree life and medical insurance).

I am sure that you will understand the reasons for our decision with respect to this matter.

Yours very truly,

/s/ J.D. Short
Vice President-Administration

United States Steel and
Carnegie Pension Fund

(A Pennsylvania Corporation)

600 Grant Street
Pitsburgh, Pennsylvania 15230

J.D. Short
Vice President — Administration

May 26, 1988

Mr. E.B. Rich
1425 Miami Drive
Birmingham, AL 35214

Dear Mr. Rich:

I write you in connection with your receipt of a USX 70/80 retirement under Mutually Satisfactory Conditions. As you will recall, you are receiving that pension because you were granted a leave of absence, retroactive to the date of your termination with United States Steel Corporation (now USX). This retroactive leave of absence was the result of the adoption by USX of a policy of granting such leaves of absence under carefully defined circumstances. This policy authorized the removal of the break in your pension continuous service, which occurred in 1953. That removal resulted in your being granted pension continuous service credit, retroactively, for the intervening period.

Since that time, three Decisions by the United States Court of Appeal (for the Second, Third and Fifth Circuits, respectively) have raised serious challenges concerning the legality of approving special, retroactive leaves of absence which enable union officials to receive credit for pension purposes for extended periods which they spend in the service of the Union. Recently, two lawsuits have been filed by former and present Union

officials -- one in Alabama by Messrs. Summerville and Elliott and the other in Illinois by Messrs. Sadlowski, Toth, Foley, et al., seeking to require USX Corporation to expand its granting of retroactive pension continuous service credit to cover the named plaintiffs for extended periods of time in which they were in the employ of the Union.

While it was the preference of USX and of the United States Steel and Carnegie Pension Fund, which is also a defendant in these actions, to await ruling from the courts concerning the appropriate action to be taken with respect to these requests for leaves of absence as well as past grants of leaves of absence, we now have been advised by outside counsel that continued payment of pension to you, in light of the current legal developments, could possibly subject both you and the defendants in these actions to criminal liability. In view of the above, we have determined that the only prudent course of action for us to take is to suspend your pension immediately, and to pay such pension into an interest bearing escrow account pending a final, definitive judicial resolution of the litigation in question and, if necessary, appropriate court rulings with respect to the leave of absence granted you (of course, while your pension is in suspension, you will not be covered by USX's retiree life and medical insurance).

I am sure that you will understand the reasons for our decision with respect to this matter.

Yours very truly,

/s/ J.D. Short
Vice President-Administration